Entered on Docket
January 25, 2011

Hon. Bruce A. Markell
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In re: SOUTH EDGE, LLC, Alleged Debtor.	Case No.: BK-S-10-32968-BAM Chapter 11 Date: January 24, 2011 Time: 9:30 a.m. Courtroom: 3

ORDER REGARDING PRESENTATION OF DIRECT TESTIMONY

During the course of the proceedings held on January 24, 2011 concerning the involuntary bankruptcy petition filed by JPMorgan Chase Bank, N.A., Wells Fargo Bank, N.A., and Credit Agricole Credit and Investment Bank ("***Petitioning Creditors***") against South Edge, LLC, the Petitioning Creditors attempted to call David Michael Wilkinson to the stand to have him offer live direct testimony. South Edge, LLC objected to this testimony on the grounds that it violated the scheduling order agreed to by the parties and approved by an order of this court. The objection was sustained and Mr. Wilkinson was not allowed to testify at that time. The Petitioning Creditors instead introduced his direct testimony via a video recording of his deposition. Subsequent to the video recording of his direct testimony, the Petitioning Creditors again sought to introduce the live direct testimony of Mr. Wilkinson, which the court allowed, but ordered that Mr. Wilkinson could only testify regarding certain documents that were received by the Petitioning Creditors over the previous weekend.

The court hereby clarifies its oral ruling on South Edge's objection to live direct testimony. This order supersedes the oral ruling made by the court during the January 24, 2011 proceedings.

Bankruptcy Rule 1018 provides that certain rules governing adversary proceedings will be applicable during proceedings concerning a contested involuntary petition.[1] Bankruptcy Rule 7016 is one of these applicable rules, and it, in turn, incorporates Civil Rule 16. Civil Rule 16, among other things, allows courts to adopt "special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems," to facilitate "in other ways the just, speedy, and inexpensive disposition" of a matter, and, in service of those ends, to hold a pretrial conference and enter a pretrial orders that will "control[] the course of the action" before the court. FED. R. CIV. P. 16.

The court held two such pre-trial conferences in this case. One was held on December 13, 2010 and another on January 11, 2011. As a product of the first pre-trial conference, the parties agreed to, and the court approved of, a scheduling order, entered on the docket for this case at Dkt. No. 82. Paragraph 14 of this order provides that "direct testimony at the . . . hearings shall be received via declarations(s)." The parties further agreed that "so long as the declarant [was] present and available in the courtroom for cross examination," the declaration would be admitted into evidence. At the conclusion of the second pre-trial conference, the court clarified the earlier scheduling order, and deemed deposition testimony to be the equivalent of declaration testimony for the purposes of the involuntary proceedings. It, therefore, allowed deposition testimony to be offered as direct testimony, notwithstanding any provision of Civil Rule 32 and subject to further conditions and limitations contained within the order. Dkt. No. 237. Nothing in either order permitted the compulsion of direct testimony by subpoena, especially for witnesses who had been previously deposed.

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[1] Specific rules the Federal Rules of Bankruptcy Procedure will be referred to as Bankruptcy Rule. Specific rules of the Federal Rules of Civil procedure will be referred to as Civil Rule.

Throughout the pre-trial conferences, as evidenced by the court's previous orders, the parties have all maintained that direct testimony would be offered and received via declaration or deposition. It is clear from the court's scheduling order that direct testimony would be offered by these means to the exclusion of any other.

Therefore, the court hereby orders that the court's previous scheduling orders shall not be further disturbed, absent a showing that deviation from these orders is necessary to prevent "manifest injustice" as envisioned by Civil Rule 16.

The court views the attempt to introduce the live direct testimony of Mr. Wilkinson to be contrary the court's previously entered orders. It is the court's ruling that, to the limited extent that Mr. Wilkinson was allowed to offer live direct testimony for the purpose of introducing newly obtained evidence, this was allowed by consent of the alleged debtor. As the court stated when it initially ruled on this matter, the court will apply this ruling consistently throughout these proceedings.

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